

REMARKS/ARGUMENTS

Applicants respectfully request reconsideration of the present application in view of the above changes to the claims and the following remarks, which are responsive to the final Office Action mailed October 7, 2008.

I. Status of Claims

In the Office Action, Claims 1, 4-7, 12, 16-22, and 26-27 were noted as pending in the application and were rejected. Applicants have amended independent Claims 1, 16, 19, and 22 to further clarify the claimed invention. As a result, Claims 1, 4-7, 12, 16-22 and 26-27 are currently pending.

II. Rejection of Claims

The Office Action rejected Claims 1, 4, 16, 19, 22, and 26 under 35 U.S.C. § 102(e) as anticipated by U.S. Patent No. 7,127,521 B2 to Hsu et al. (hereinafter “*Hsu*”). The Office Action further rejected Claim 12 under 35 U.S.C. § 103(a) as being unpatentable over *Hsu* in view of what was well known in the art. Claims 5-7, 17-18, 20-21, and 27 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Hsu* in view of U.S. Patent No. 5,619,650 to Bach et al. (hereinafter “*Bach*”).

a. 35 U.S.C. 102 – *Hsu*

i. Independent Claims 1, 16, 19, and 22

Applicants respectfully assert that *Hsu* does not teach or suggest each of the recitations of independent Claim 1, 16, 19, or 22, as amended. In particular, Applicants respectfully assert that *Hsu* does not teach or suggest a data throttle limiting the transfer rate of data from a first host to a second host where the throttle value is *less than or equal to the least of* a first data transfer rate of the first host, a second data transfer rate of the second host, and a third data transfer rate of a network between the first and second hosts, and where the data transfer rates are *obtained during*

a communication start-up process from a signaling message, as recited, albeit in somewhat different language, in independent Claims 1, 16, 19, and 22, as amended.

Applicants note that *Hsu* is directed to “an apparatus for reducing power consumption in a network linking system, in which a load monitoring module is installed such that the load of the network can be monitored” (*Hsu*, Col. 2, lines 10-14). First, a network interface card is connected to a remote-end network interface card (*Id.*, Col. 4, lines 46-49). “*After linking*, the load monitoring module is enabled to perform monitoring of network flow” (*Id.*, Col. 4, lines 63-64) (*emphasis added*). If the average network load is higher or lower than a specified threshold, *Hsu* attempts to re-autonegotiate the link between data transmissions at a new link speed. (See *Id.*, Col. 4, line 65 – Col. 5, line 24).

Hsu clearly fails to disclose a throttle value *less than or equal to the least of* a first data transfer rate of the first host, a second data transfer rate of the second host, and a third data transfer rate of a network between the first and second hosts. The Examiner cites the average network load of *Hsu* as teaching the third data transfer rate of the network recited in the independent claims. According to the cited portion of *Hsu*, however, if the average network load is equal to a value lower than 50 Mbps, a downward switching of link speeds occurs. But the switching described *only decreases the link speed from 1 Gbps to 100 Mbps* (See Col. 4, line 59 – Col. 5, line 11). At this point, the maximum possible value for the average network load is *below* 50 Mbps. A link speed of 100 Mbps, therefore, is not less than or equal to even the maximum possible average network load.

Hsu later describes a situation where the linking speed is set to 100 Mbps and the average network load is determined to be any value higher than 80 Mbps. At this point, rather than setting a throttle to less than or equal to the lower linking speed, *Hsu* actually instructs **increasing** the linking speed from 100 Mbps to 1 Gbps. Thus, if the average network load was determined to equal 85 Mbps and the current link speed was set to the higher value of 100 Mbps, the link speed would actually be *increased* to 1 Gbps rather than *decreased* to less than or equal to 85 Mbps. Therefore, *Hsu* actually teaches the **opposite** of the recitations of independent

Claims 1, 16, 19, and 22. For this reason, Applicants respectfully assert that *Hsu* does not anticipate independent Claims 1, 16, 19, and 22, as amended, and request the rejection of these claims be withdrawn.

Applicants additionally point out that *Hsu* fails to disclose obtaining the transfer data rate of a network in between the first and second hosts *during a communication start-up process*, as recited, albeit in somewhat different language, in independent Claims 1, 16, 19, and 22, as amended. In the Office Action, the Examiner concedes that in *Hsu* the “network load is monitored (the rate at which data transfer occurs over the network between the local and remote NICs)” (Official Action, page 4). Nowhere in *Hsu* is there any suggestion of obtaining the network data rate other than through “monitoring of network flow [to] evaluate the average load within a time interval” (*Hsu*, Col. 4, lines 64-65). Monitoring the network flow between the local and remote NICs during data transmission to determine an average load is not the same as obtaining the data transfer rate of the network during a communication start-up process. For this reason, Applicants submit that *Hsu* fails to teach or suggest every element of independent Claims 1, 16, 19, and 22, and asks that the rejection of these claims be withdrawn.

Furthermore, *Hsu* does not teach or suggest obtaining the network transfer data rate *from a signaling message*, as recited, albeit in somewhat different language, by independent Claims 1, 16, 19, and 22, as amended. Again, as previously discussed, and conceded by the Examiner, *Hsu* determines the network data rate by monitoring the network flow using a load monitoring module and evaluating the results over a time interval. There is no mention in *Hsu* of obtaining the transfer data rate of the network from a signaling message as recited by the independent claims. For this additional reason, Applicants assert that independent Claims 1, 16, 19, and 22 are further patentable over *Hsu*.

Finally, in the Office Action, the Examiner asserts that the feature of obtaining data transfer rates during a communication start-up process is disclosed in *Hsu*. The Examiner points to the disclosure in *Hsu* that autonegotiation recurs, if warranted, during “a time interval without data transmission between both ends,” (*Hsu*, Col. 5, lines 7-8) which “may therefore be equated

to occurring during a communication start-up process” (Official Action, page 4). Applicants, however, respectfully disagree that these two aspects are equivalent. *Hsu* is directed to a system where “the link speed is dynamically adjusted by monitoring the load of the network without deteriorating transmission efficiency” (*Hsu*, Col. 6, lines 27-28). To maintain this transmission efficiency, the adjustment of link speed occurs during a time “*without data transmission between both ends*” (*Hsu*, Col. 5, lines 7-8). In *Hsu*, the communication between the two entities has already begun and will continue after adjusting the link speed. This is not the same as obtaining data transfer rates during *communication start-up*, as recited in independent Claims 1, 16, 19, and 22.

Based on the all of the foregoing arguments, Applicants respectfully assert that *Hsu* does not teach or suggest all of the recitations of independent Claims 1, 16, 19, and 22 and respectfully requests that the rejection of these claims be withdrawn.

ii. Dependent Claims 4 and 26

Claims 4 and 26 depend from independent Claims 1 and 22, respectively, and include all of the recitations of the base claim and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. Thus, for at least the reasons set forth above with respect to independent Claims 1 and 22, it is respectfully submitted that dependent Claims 4 and 26 are further patentable over the references cited as such dependent claims now depend from an allowable base claim.

b. 35 U.S.C. 103 – *Hsu* in view of what was known in the art

i. Dependent Claim 12

Claim 12 depends from independent Claim 1 and includes all of the recitations of the base claim and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. What was known in the art does not cure the noted deficiencies of *Hsu* and is not cited by the Examiner as doing so. Thus, for at least the reasons set forth above

with respect to independent Claim 1, it is respectfully submitted that dependent Claim 12 is further patentable over the references cited as such dependent claim now depends from an allowable base claim.

c. 35 U.S.C. 103 – *Hsu* in view of *Bach*

i. Dependent Claims 5-7, 17-18, 20-21, and 27

Claims 5-7, 17-18, 20-21, and 27 depend from independent Claims 1, 16, 19, and 22, respectively, and include all of the recitations of the base claims and any intervening claims plus their additional recitations that further distinguish the art applied in the rejection. The teachings of *Bach* do not cure the noted deficiencies of *Hsu* and are not cited by the Examiner as doing so. Thus, for at least the reasons set forth above with respect to independent Claims 1, 16, 19, and 22, it is respectfully submitted that dependent Claims 5-7, 17-18, 20-21, and 27 are further patentable over the references cited as such dependent claims now depend from allowable base claims.

Appl. No.: 10/758,854
Amdt. dated February 18, 2009
Reply to Office Action of January 21, 2009

III. Conclusion

In light of the remarks above, Applicants respectfully submit that the application is in condition for allowance and respectfully requests that a Notice of Allowance be issued. The Examiner is encouraged to contact Applicants' undersigned attorney to resolve any remaining issues in order to expedite examination of the present application.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefor (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,

/Kevin P. Belote/

Kevin P. Belote
Registration No. 62,990

Customer No. 00826
ALSTON & BIRD LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Tel Atlanta Office (404) 881-7000
Fax Atlanta Office (404) 881-7777

ELECTRONICALLY FILED USING THE EFS-WEB ELECTRONIC FILING SYSTEM OF THE UNITED STATES PATENT & TRADEMARK OFFICE ON FEBRUARY 18, 2009.